

1 when you read his credentials and listen to  
2 his testimony.

3 ADMIN. JUDGE SIPPEL: I have to  
4 apply the appropriate weight. That's my job.

5 MR. SCHONMAN: Yes, sir.

6 MR. LYON: And, Your Honor, again,  
7 I would note my objection or at the  
8 appropriate time I'll make my objection to  
9 Detective Shilling testifying as an expert  
10 having not been designated and having not  
11 given a report.

12 But I made this point several  
13 times. I'm not going to run it into the  
14 ground.

15 ADMIN. JUDGE SIPPEL: Well, I  
16 think we've taken it about as far as we can.  
17 I was just trying to be fair to both side by  
18 pointing out what my concerns are. And it's  
19 not a personal attack against the situation  
20 that Detective Shilling is in with respect to  
21 this case and his testimony. But there  
22 certainly is -- in my mind, there is an

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1     *element of fear and this with respect to equal*  
2     treatment on both sides in terms of bringing  
3     in expert testimony. I mean, that bothers me.  
4     And I'm trying to figure out in my mind how to  
5     handle it and still giving both sides an  
6     opportunity to put their case in.

7             I discussed it about it with you  
8     now today as much as I can. We're going to  
9     have the pre-hearing. We're going to go over  
10    this testimony very carefully at the  
11    admissions session. And it may take us, you  
12    know, a fairly long time to do it. But I have  
13    to hear argument on both sides before I can  
14    make a ruling on this stuff.

15            When I say this "stuff" again, I  
16    don't mean to demean it in anyway. It's a  
17    shorthand way of saying that the testimony  
18    that's being proffered with respect to  
19    Detective Shilling, all the way up to page 10  
20    of 10.

21            And, again, this problem comes  
22    back to the fact that he was never proffered

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1 as -- the procedures that I laid out in the  
2 beginning weren't followed. So, now the  
3 burden becomes the Court's to have to deal  
4 with this.

5 MR. KNOWLES-KELLETT: Your Honor--

6 ADMIN. JUDGE SIPPEL: I'm sorry?

7 MR. KNOWLES-KELLETT: I don't  
8 remember you ever telling us that --

9 ADMIN. JUDGE SIPPEL: Because you  
10 never told me you were going to proffer an  
11 expert. That was -- I mean, if --

12 MR. KNOWLES-KELLETT: I looked at  
13 Rule 26. You told him that if he was going to  
14 hire an expert, Rule 26 applies.

15 ADMIN. JUDGE SIPPEL: He didn't  
16 have to hire an expert. He could proffer an  
17 expert. Maybe the expert would have said,  
18 gee. I feel so strongly about this case, I'm  
19 going to do it for nothing. And that happens.  
20 That happens.

21 MR. KNOWLES-KELLETT: Rule 26  
22 doesn't apply, right?

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1           ADMIN. JUDGE SIPPEL: Of course it  
2 does. He's proffering him as a witness, as an  
3 expert witness.

4           You don't have to pay a person to  
5 proffer him as an expert witness.

6           MR. KNOWLES-KELLETT: The way I  
7 read Rule 26, it say, if you retain or employ  
8 an expert.

9           ADMIN. JUDGE SIPPEL: Well, are  
10 you retaining or employing. Okay.

11          MR. KNOWLES-KELLETT: No. We did  
12 neither with respect to Detective Shilling.  
13 He's a fact witness who when we met with him  
14 we found out his expertise would help --

15          MR. LYON: Your Honor, I think  
16 that --

17          MR. KNOWLES-KELLETT: I don't  
18 think it's --

19          ADMIN. JUDGE SIPPEL: Wait a  
20 minute. Wait a minute. I can' hear two at  
21 one.

22          MR. LYON: I'm sorry.

1 ADMIN. JUDGE SIPPEL: You finish  
2 yours, Mr --

3 MR. KNOWLES-KELLETT: Okay. When  
4 I talked to him I realized that his expertise  
5 where you were making a decision in this  
6 matter be included what he had to say about  
7 Mr. Titus in our testimony.

8 It was not like we engaged him to  
9 use this model. He uses this model as part of  
10 his job as a police officer for Seattle. He's  
11 required to use this model.

12 MR. SCHONMAN: Your Honor, if I  
13 might add.

14 We didn't go out and retain an  
15 expert to talk about the process of assessing  
16 a person for a Level 2 or Level 3. We didn't  
17 go out and get some independent individual and  
18 hold that person out as an expert.

19 Detective Shilling is the person  
20 who was involved. He's the sole person. He  
21 is the key person in charge of assessing sex  
22 offenders in the Seattle Police Department and

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1 he was involved in assessing David Titus'  
2 status as a sex offender. So, he's a fact  
3 witness. He happens to be an expert in that  
4 field by his experience and training. And he  
5 can explain all his credentials.

6 ADMIN. JUDGE SIPPEL: All right.  
7 I hear. I hear what you're saying.

8 MR. LYON: Your Honor, if I could  
9 be heard.

10 Rule 26 uses two words. Employ,  
11 retain. The Bureau, I think, is giving a very  
12 negatively definition to retain. Retain means  
13 to use and to proffer to the Court as an  
14 expert. That's what they're doing with Mr.  
15 Shilling.

16 The fact that they haven't  
17 employed him, that Seattle is paying a salary  
18 doesn't matter. Under any reasonable  
19 definition of the word "retain". They've  
20 retained him. He's their witness. They're  
21 offering him and I think I was entitled to a  
22 report.

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1 ADMIN. JUDGE SIPPEL: And you're  
2 saying this -- you're saying that, oh, no. We  
3 don't fit within the rubric of those words,  
4 retain or employ?

5 MR. SCHONMAN: Exactly.

6 ADMIN. JUDGE SIPPEL: Well, okay.

7 I'll tell you what I want. I want  
8 by April the 9th a bench brief on the question  
9 of what the meaning of those terms are in Rule  
10 26B. That's number one.

11 And number two, I want the Bureau  
12 to explain exactly why it is that they never  
13 proffered this man as an expert testimony for  
14 examination under Rule 26B.

15 MR. SCHONMAN: Your Honor, I can  
16 do that right now.

17 ADMIN. JUDGE SIPPEL: No, no, no,  
18 no, no, no. I want to see it put down in  
19 writing.

20 MR. SCHONMAN: Yes, sir.

21 MR. LYON: Your Honor, you want a  
22 brief from both of us on --

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1 ADMIN. JUDGE SIPPEL: Yes. They  
2 don't have -- yes. Just cross briefs.

3 MR. LYON: Not a party to theirs.

4 ADMIN. JUDGE SIPPEL: Better yet,  
5 you reply.

6 MR. LYON: Okay. Can I reply by  
7 April 11th?

8 ADMIN. JUDGE SIPPEL: Well, you  
9 can do it earlier. I mean, I'm not -- yes.  
10 Let's not hold the conversation here.

11 Do you want to go off the record  
12 and talk we'll do that.

13 MR. LYON: Yes.

14 ADMIN. JUDGE SIPPEL: We'll go off  
15 the record and talk.

16 (Whereupon, off the record from  
17 9:54 a.m. to 9:55 a.m.)

18 ADMIN. JUDGE SIPPEL: Okay.  
19 You'll be given a chance to consult outside.  
20 Now, what's going on?

21 MR. KNOWLES-KELLETT: As the part  
22 of the bench brief, Your Honor, we may find

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1 that George's definition of retain is an  
2 appropriate definition and --

3 ADMIN. JUDGE SIPPEL:  
4 Inappropriate or --

5 MR. KNOWLES-KELLETT: If it is an  
6 appropriate definition --

7 ADMIN. JUDGE SIPPEL: I can't hear  
8 you. Is it inappropriate you're using or is  
9 it --

10 MR. KNOWLES-KELLETT: If it is --

11 ADMIN. JUDGE SIPPEL: Appropriate?

12 MR. KNOWLES-KELLETT: -- an  
13 appropriate definition.

14 ADMIN. JUDGE SIPPEL: I hear you  
15 now. Thank you.

16 MR. KNOWLES-KELLETT: Okay. We'll  
17 agree to strike the parts where he says in my  
18 opinion from his testimony and just say, this  
19 is what I'm required to do as part of my job  
20 is use this model and --

21 ADMIN. JUDGE SIPPEL: Oh, okay.  
22 Let me leave it this way then.

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1                   While I'm in Europe, you can work  
2 this out amongst yourselves. If you can't, I  
3 want the bench brief that I've indicated to  
4 you on Tuesday the 1st to be exchanged and  
5 submitted to me. And then a response will  
6 come in on the 7th of April from Mr. Lyon.

7                   And the issue is the two issues.  
8 The meaning with respect you're giving to  
9 retain an employment under rule 26 of the  
10 Federal Rules the specific reasons you're  
11 giving as to why you did not tender Mr.  
12 Shilling as an expert witness under those  
13 procedures of Rule 26.

14                  But as I say if you stipulate to  
15 something or if you work this out amongst  
16 yourselves and we don't have to go down that  
17 road, then fine.

18                  MR. SCHONMAN: Your Honor, it may  
19 come down to having Detective Shilling testify  
20 as a fact witness with the recognition that he  
21 is a very experienced individual in the field  
22 in which he practices.

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1                   ADMIN. JUDGE SIPPEL: Whatever the  
2 record supports, the findings should support.  
3 Should follow it.

4                   It has to be relevant. It has to  
5 be probative and it has to be within the  
6 ground rules of the procedures that are  
7 followed in these cases. And coupled with the  
8 procedures that I have prescribed for use in  
9 this case.

10                  All right. Let's not beat a dead  
11 horse. Now, I think we know where we are on  
12 this point.

13                  What's the next point? The next  
14 point is cross examination by speaker phone.  
15 What is the Bureau's position on that?

16                  MR. LYON: I think they've reached  
17 an agreement.

18                  MR. SCHONMAN: We have. Detective  
19 Shilling will appear in person as will Mr.  
20 Titus.

21                  Dr. Allmon will appear by speaker  
22 phone. We've agreed on that.

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1           And Mr. Sherman, another Bureau  
2 witness will appear by speaker phone. And I  
3 believe that there are a number of character  
4 witnesses on behalf of Mr. Titus who we did  
5 not notice for cross examination.

6           ADMIN. JUDGE SIPPEL: Okay.

7           MR. SCHONMAN: Although we do  
8 question the number of them. We think there  
9 are an excessive number of testimonials.

10           If Your Honor doesn't have a  
11 problem with the number of testimonials, then  
12 we will not raise an objection to it.

13           ADMIN. JUDGE SIPPEL: How many are  
14 there?

15           MR. LYON: Give me a second, Your  
16 Honor. There are 11, Your Honor, although as  
17 you noted, our submission is quite brief.  
18 It's one or two pages per person.

19           ADMIN. JUDGE SIPPEL: All right.  
20 I'll permit it. I'll permit. I mean,  
21 obviously this all goes to weight. But, if  
22 that's the way Mr. Titus wants to present his

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1 case and it's not going to be disruptive and  
2 I appreciate the Bureau taking the position  
3 that they'll hold back from insisting on cross  
4 examining these types of witnesses. I'll let  
5 it come in the way that you want to do it.

6 MR. LYON: Thank you, Your Honor.

7 ADMIN. JUDGE SIPPEL: Okay. Okay.

8 What else was on my list? That's  
9 about it, isn't it?

10 MR. LYON: I think the question of  
11 rebuttal may still be outstanding.

12 ADMIN. JUDGE SIPPEL: Okay. Let's  
13 talk about rebuttal.

14 MR. LYON: Your Honor, I think  
15 under all the circumstances I would probably  
16 like to submit written rebuttal, expert  
17 testimony in advance. It's probably going to  
18 be Dr. Allmon and Dr. Natalie Novik-Brown.  
19 And there may be some additional rebuttal  
20 testimony by Lieutenant Steele. I haven't  
21 made a decision on that.

22 If Your Honor rules as I hope that

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1 you will rule with respect to Detective  
2 Shilling's testimony, some of that rebuttal  
3 may not be necessary. But given that I can't  
4 make that determination in advance, and I  
5 don't want to put the rebuttal witnesses under  
6 time pressure, and I'd also like to wrap this  
7 hearing up as quickly as possible for my  
8 client's financial benefit, I think it's most  
9 appropriate to submit the rebuttal in advance.

10 And it also can't be any prejudice  
11 to the Bureau to have that information when  
12 they're doing their direct case.

13 ADMIN. JUDGE SIPPEL: Well,  
14 suppose two things were done?

15 I'm picking up on the Bureau's  
16 proffer. I'll call it proffer to eliminate  
17 the opinion -- ask that the opinion aspects of  
18 the Shilling testimony. Supposing that they  
19 recast that testimony along the lines that we  
20 discussed here or that they proffered to do  
21 rather than go over it and, you know, say no  
22 objection now. And at the same time that you

1 could proffer to them what would be your  
2 rebuttal if it's needed. You want to tell  
3 them. I mean, you're right. But I don't  
4 want to say that because you prepare it and  
5 that it's given to them that you're  
6 automatically going to be able to use it at  
7 the close of the case as evidence.

8 MR. LYON: I understand.

9 ADMIN. JUDGE SIPPEL: I have to  
10 decide whether or not rebuttal is needed for  
11 purposes of the record.

12 MR. LYON: I understand, Your  
13 Honor.

14 I would hope that the Bureau and I  
15 could come to an agreement, but I think the  
16 Bureau's view of the facts in Mr. Shilling's  
17 testimony is substantial and more liberal than  
18 my view. And my view is that distilling the  
19 facts in Shilling's testimony probably knocks  
20 it down to a half a page.

21 So, I am not optimistic I can come  
22 to an agreement with them. I certainly will

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1     *give it the best shot, Your Honor.*

2                   ADMIN. JUDGE SIPPEL:   All right.  
3     Well, I'm not asking the Bureau to commit  
4     itself in advance, but I'm expecting to see it  
5     cast in a lot different light than it has been  
6     in Exhibit 3 as we see it now.

7                   But, you know, that's right.   We  
8     have to just wait and see.

9                   Now the other option would be and  
10    I've indicated this before.   I don't know if  
11    this meets your economic, you know, the  
12    economies of the case for you.   But we could  
13    wait until the whole record is in and then you  
14    could make, you know, give you a week or a  
15    couple of days to decide whether or not you  
16    want to go forward with your rebuttal or hear  
17    argument on rebuttal -- argue the need for  
18    rebuttal after we close the cases in chief.  
19    Think about that.

20                  MR. LYON:   Quite honestly it's a  
21    hard decision.   I think I'd rather get it done  
22    in advance.

1 ADMIN. JUDGE SIPPEL: Right. I  
2 hear you.

3 MR. LYON: And if it's not needed,  
4 it's not needed.

5 ADMIN. JUDGE SIPPEL: Okay. Let's  
6 do it that way. Well, that's fine. No. It's  
7 perfectly appropriate. But I'm going to take  
8 it as being a proffer and at the time that the  
9 Bureau gives you their recast -- you're not  
10 objecting to doing that. Is that correct?  
11 The recasting of Exhibit 3 which is Detective  
12 Shilling's testimony?

13 MR. SCHONMAN: When you say recast  
14 are you talking about --

15 ADMIN. JUDGE SIPPEL: I'm talking  
16 about what you said you were going to do.

17 MR. SCHONMAN: Having us rewriting  
18 the whole thing or just striking references  
19 here and there as we would do at an admission  
20 session?

21 ADMIN. JUDGE SIPPEL: No. I was  
22 talking about the former. I mean, since

1 you've got the time, the time before an  
2 admission session that does -- it's not that  
3 lengthy a document that in light of what I  
4 heard in the courtroom that his opinion  
5 statements would be taken out. That would be  
6 the easiest way to do it. Then we wouldn't  
7 have to spend that much time in an admission  
8 session going over the thing line by line.  
9 Except with the caveat, of course, as Mr. Lyon  
10 said, that he's not going to agree with  
11 everything that you do on it.

12 MR. SCHONMAN: Your Honor, I don't  
13 know how much opinion there is in here. I  
14 mean, we could --

15 MR. LYON: Your Honor, if I may.  
16 Why don't I and the Bureau attempt in good  
17 faith to negotiate this point. I'm not  
18 sanguine that it will happen but I'll give it  
19 my best show.

20 ADMIN. JUDGE SIPPEL: All right.  
21 What do you say to that, Mr.  
22 Schonman?

1 MR. SCHONMAN: We could talk with  
2 Mr. Lyon.

3 ADMIN. JUDGE SIPPEL: Well, I'm  
4 going to have to issue an order, but I will  
5 condition my order with respect to anything  
6 that the parties can agree to between now and  
7 the date we're going to have the admission  
8 session. I certainly would go along within  
9 certain parameters, of course.

10 I think maybe 24 hours after this  
11 pre-hearing conference maybe things will  
12 loosen up a little bit and you can start  
13 talking a little bit about what might be  
14 workable, if I'm making myself clear.

15 What I'm trying to do is obviously  
16 get the contentions out of the atmosphere as  
17 much as I possibly can with respect to these  
18 procedural and evidentiary points so that we  
19 can move the case in and get on with it. And  
20 I'm part of the culprit so I'm not criticizing  
21 anybody here in terms of where we are. But I  
22 feel very strongly about these things.

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1                   Now -- so anyway. That -- that --  
2 well, so -- but, oh. I know what the question  
3 I had was. All right. So, if we do have  
4 Novik-Brown and Steele and Allmon on rebuttal,  
5 that with written statements, then the cross  
6 examination would be conducted by speaker  
7 phone?

8                   MR. KNOWLES-KELLETT: No, sir.

9                   MR. SCHONMAN: Well, we don't  
10 know.

11                  ADMIN. JUDGE SIPPEL: Okay. Why  
12 don't you know? I'm sorry.

13                  MR. KNOWLES-KELLETT: We agreed to  
14 Dr. Allmon because we met him and he's a  
15 straight shooter and we didn't think his  
16 demeanor was necessary. But we don't even  
17 know who these people are.

18                  ADMIN. JUDGE SIPPEL: So, what  
19 you're saying is that your position might be  
20 that they're required to come in and testify  
21 live in rebuttal?

22                  MR. SCHONMAN: Yes, sir.

1 Absolutely. We've not met them. We've not  
2 deposed them. We've not spoken with them.

3 MR. LYON: You mean Novik-Brown  
4 and Steele?

5 MR. SCHONMAN: Dr. Allmon, yes.  
6 Dr. Allmon is a different story.

7 MR. LYON: Dr. Allmon by speaker  
8 phone.

9 MR. KNOWLES-KELLETT: We've spent  
10 thousands of dollars to meet him and get to  
11 know him.

12 ADMIN. JUDGE SIPPEL: Okay. I  
13 hear you.

14 What was your position on that?  
15 Is there any way that we can resolve that this  
16 morning or do I have to just rule on it?

17 MR. LYON: It will cost my client  
18 a substantial amount of money to bring Dr.  
19 Brown. Lieutenant Steele is a different  
20 matter. I'd like to find some way that we  
21 could avoid bringing Dr. Brown out, perhaps  
22 testifying by video phone is a possibility.

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1 I don't know if the Commission has  
2 the capability to have video testimony here or  
3 not. It's not an issue that I've ever had to  
4 deal with.

5 MR. SCHONMAN: Your Honor, I'm  
6 sorry?

7 MR. LYON: I think if we have an  
8 Internet line in here then it can be done.  
9 But, again, I don't know.

10 ADMIN. JUDGE SIPPEL: Well, we can  
11 look into that. We'll notice to look into it  
12 anyway.

13 But, I'm sorry, Mr. Schonman.

14 MR. SCHONMAN: I have a question  
15 if I might direct it to Mr. Lyon.

16 ADMIN. JUDGE SIPPEL: Sure.

17 MR. SCHONMAN: Is the rebuttal  
18 witness Steele, is that Lieutenant Stephanie  
19 Steele?

20 MR. LYON: Yes.

21 MR. SCHONMAN: So, you're  
22 contemplating bringing Lieutenant Steele in,

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1 a police lieutenant in as an expert witness?

2 MR. LYON: As a rebuttal witness.

3 Not -- not as an expert. Well, actually maybe  
4 as an expert in police procedure. This is  
5 still forming in my mind so --

6 MR. SCHONMAN: Well, now is the  
7 place to share with the judge what you're  
8 contemplating. You're proposing putting in  
9 rebuttal evidence in advance which the judge  
10 will read, although the judge can disregard it  
11 if he finds that rebuttal is not necessary.  
12 But now we're going down the road with a  
13 potential expert witness and we've just gotten  
14 done for the past hour discussing expert  
15 witnesses. Now, we're hearing for the first  
16 time that you may have an additional expert  
17 witness in the nature of a police officer.

18 MR. LYON: Yes. That seems to  
19 give you pause. As a rebuttal, there is no  
20 requirement under Rule 26 to tender a report  
21 for a rebuttal witness.

22 But, again, I'm not sure that I'm

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1 going to bring Lieutenant Steele. I'm not  
2 sure that I even need to. But, Lieutenant  
3 Steele has raised some issues with me as to  
4 the Mercer Island incident and the way police  
5 officers tend to behave under certain  
6 circumstances. And I'm thinking that might be  
7 something that would assist the trier of fact.

8 Again, I'm still evaluating it and  
9 I don't think I have to designate rebuttal  
10 witnesses at this point. I think the judge  
11 may give me a date or I'm willing to agree to  
12 a date in advance of the hearing to do so.

13 MR. SCHONMAN: I just want to make  
14 sure I understand.

15 Lieutenant Stephanie Steele is a  
16 police officer in Idaho and you're  
17 contemplating bringing her in as an expert to  
18 talk about procedures in Mercer Island.

19 MR. LYON: No. I don't think you  
20 understood me.

21 What I said is that Lieutenant  
22 Steele may testify as to how police officers

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1     behave     under     certain     circumstances.  
2     Specifically, when they have a witness who  
3     they think is not giving them adequate  
4     respect.

5                   MR. SCHONMAN:     Your Honor, it  
6     remains to be seen how that would assist you  
7     in determining whether Mr. Titus' license  
8     should be revoked or not. But that's not an  
9     issue that we have to cross right now, I  
10    suppose.

11                   ADMIN. JUDGE SIPPEL: Well, don't  
12    worry about me and what I might need. It's  
13    whether or not you're going to -- I'm only  
14    interested in terms of how you might present  
15    your case. And if you're going to object to  
16    that and know you're going to object to that  
17    now, so raise it. I'd like to hear. If  
18    you're going to wait and see what happens, we  
19    can do that too.

20                   MR. SCHONMAN:     Well, I have no  
21    idea what Lieutenant Steele would testify  
22    about. I know --

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